In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 354

JOSEPH J. IMHOFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was retired from active Army service as a lieutenant colonel in November, 1956, by reason of length of service. In this suit filed in the Court of Claims in 1958, petitioner complained that he was entitled, instead, to retirement for lack of physical fitness for duty, allegedly beginning in 1953.[1] The

[1] The amount of petitioner's retirement pay does not depend upon whether he is retired for length of service (10 U.S.C. 3916) or for disability (10 U.S.C. 1201). See 10 U.S.C. 3991, 10 U.S.C. 1401. However, there is a difference in the

decision below, rejecting that contention and the assertion of numerous procedural irregularities in the proceedings reviewing the claim of disability, is clearly correct, and further review is unwarranted.

In 1953, a Medical Board at Brooke Army Hospital, Texas, found petitioner physically unfit for further military service by reason of spinal arthritis and a lumbo sacral strain. The Medical Board recommended that he appear before a Physical Evaluation Board. The Evaluation Board felt that "there is just a question of doubt" as to petitioner's fitness to continue on duty and giving him the benefit of that doubt recommended that he be found unfit for service. However, the Army Physical Review Council, after reviewing the findings of the Physical Evaluation Board, ruled that "the evidence of record does not clinically confirm the existence of any disability of a degree which would preclude the performance of military duty." That ruling was affirmed by the Army Physical Disability Board (Pet. App. 12a-13a). The Inspector General of the Army rejected petitioner's contention that he had not been sufficiently advised of the reasons for the action of the Physical Evaluation Record (Pet. App. 15a-16a).[2]

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federal income tax payable on the benefits. See generally, *Espenshade* v. *United States*, 354 F. 2d 332 (Ct. Cl.). Petitioner was awarded the retirement pay of a full colonel with over 30 years' longevity (Pet. App. 9a), which means that he receives 75% of the base pay of a colonel on active duty.

[2] The relationship of these Boards is set out in Army Reg. 15-160 (Pet. App. 41a-46a).

In June 1954, a Medical Disposition Board at Brooke Army Hospital found petitioner unfit for duty, and a second Physical Evaluation Board concurred in that finding (Pet. App. 17a). The Physical Review Council again recommended that petitioner be declared physically fit for duty. That recommendation was again approved by the Physical Disability Appeal Board (Pet. App. 18a).[3]

In November 1954, petitioner was transferred from Texas to Washington, D.C. An Officer Efficiency Report, made by a rating officer for the period June 1, 1955, to May 31, 1956, on the basis of close daily contact with petitioner, stated that his performance of duties was "outstanding", and that he possessed the physical, mental and moral qualities for his grade, branch, and length of service (Pet. App. 19a-20a).

On July 31, 1956, petitioner was advised that he would be retired on November 30, 1956, by reason of the legal requirement (10 U.S.C. 3916) that lieutenant colonels be retired 30 days after completion of 28 years' service (Pet. App. 19a-20a).

On November 15, 1956, petitioner was admitted to Walter Reed Army Hospital, where he underwent extensive physical examinations. A Board of Medical Officers convened at Walter Reed on November 21, 1956, found that he had "minimal" osteoarthritis of

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[3] By letter of July 19, 1954, petitioner requested that action on his tender of resignation (made in October 1953, Pet. App. 14a) be held in abeyance pending receipt of further advice from him. The Adjutant General advised him that his request for withdrawal of tender of resignation was approved (Pet. App. 18a).

the spine and a "minimal" lumbo sacral strain. The Board further found that his degree of disability for military service was "None", and that he was fit for general military duty commensurate with his age, rank and experience (Pet. App. 21a-23a).[4]

After petitioner objected to the determination that he was physically fit for duty, he was advised on January 11, 1957, that the Surgeon General had determined that he was physically qualified for duty. After his discharge, petitioner requested the Army Board for Correction of Military Records to change his discharge to provide for not less than 40% permanent physical disability. That Board denied the application on April 24, 1957, on the ground that insufficient evidence had been presented to indicate probable material error or injustice (Pet. App. 24a).

Petitioner's allegations of procedural errors committed in 1953 and 1954, in the process of review of findings of the Physical Evaluation Boards, are neither germane to the question of his entitlement to retirement benefits based upon physical disability, nor substantial. In 1956, a Medical Board at Walter Reed Army Hospital, immediately after thorough physical examinations, found petitioner fit for general duty. The Army Board of Correction of Military Records denied petitioner's application for re-

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[4] By order of the Secretary of the Army, petitioner was allowed to be recalled to active duty from December 1, 1956, to January 31, 1957, so that he could obtain the benefits of the recently enacted Servicemen's and Veterans' Survivor Benefits Act, 70 Stat. 857 (Pet. App. 23a-24a).

view. Unless the 1956 determination could be overturned, it is not apparent how petitioner could be granted relief. Certainly there is no basis, statutory or otherwise, for granting past retirement benefits of any nature for the years in which petitioner voluntarily remained in active service at a rate of pay higher than the pay he would have received if he had been retired for disability.

Nor is there any merit to petitioner's charges of procedural irregularities in the 1953 and 1954 proceedings. Petitioner contends (Pet. 9-10) that the Army Physical Disability Review Board prejudged the case in 1954, because on July 13, 1954, before the Board made its decision, the Adjutant General sent a telegram (Pet. App. 49a) to the Commanding General at Brooke Hospital stating that that Board had concurred in the findings of the Review Council. Since petitioner's contention apparently was never made until the time of trial—8½ years after the telegram was sent—it is impossible to reconstruct the events with certainty. However, the logical inference from the record is not that there was "prejudgment" of the case, but either that the telegram is misdated, or that the Board decided the case on July 13, 1954, and notified the Adjutant General informally that day but did not submit its formal written notification of the decision to the Adjutant General until two days later.

Petitioner's contention (Pet. 11-13), that the Physical Review Council failed to make specific findings and failed to advise him "on the point of dis-

agreement" between the Physical Evaluation Board and the Physical Review Council is groundless. As the Court of Claims pointed out (Pet. App. 7a-8a) petitioner's lengthy statements in opposition to the 1953 and 1954 determinations of the Review Council show that he adequately understood the issue. There was essentially no dispute concerning the nature of petitioner's ailments, and the "point of disagreement" was—as indicated by the Review Council—whether the clinical findings supported the view that the ailments were "of a degree which would preclude the performance of military duty" (See Pet. App. 2a-5a).[5]

Finally, there is no merit to the contentions (Pet. 14-15) that the court below applied erroneous standards in determining whether petitioner was fit for duty, and that the determination was not supported by the evidence. Far from suggesting that petitioner's ability to perform desk work in an outstanding manner was conclusive, the Court of Claims expressly stated that (Pet. App. 6a), while that fact lent some support to the determination of non-disability, it would not be given undue emphasis in considering fitness for general duty.

There is substantial evidence in the record to justify the finding that petitioner was fit for duty.

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[5] Nor is there any support in the applicable regulation (AR 15-160, Pet. App. 41a-46a) for the view that the Physical Review Council must make detailed factual findings. On the contrary, the regulation seems to contemplate broad general findings, such as that the disability is or is not "permanent" (see Par. 2(a), Pet. App. 42a).

For example, x-rays taken on at least two separate occasions revealed that petitioner had only "minimal" arthritis (Pet. App. 21a-23a), and thorough physical examination resulted in a diagnosis of "minimal" lower back strain. The Board of Medical Officers at Walter Reed specifically found petitioner fit for "general" military duty commensurate with his age, rank and experience, including overseas duty, and that his degree of disability for military service was "None". It recommended his return to "full military duty" (Pet. App. 22a-23a).[6]

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[6] Petitioner's assertion (Pet. 15) that he was found unfit in every case in which he was personally examined by a medical officer, is incorrect. See, generally, the evidence summarized in the findings of the court below (Pet. App. 20a-26a). Defendant's Exhibits 84-98 show that the petitioner's physical examinations in 1956 were thorough, and that the action of the Medical Board was based on and supported by, numerous consultation reports.

The Court of Claims also properly rejected petitioner's factual allegations (Pet. 14) that the Medical Board at Walter Reed treated him unfairly (Pet. App. 8a-9a).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

AUGUST, 1967.

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